No. 85-1643

Supreme Court, U.S.
FILED
MAY 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STROH CONTAINER COMPANY,

Petitioner,

against

DELPHI INDUSTRIES, INC.
and GEOCARIS AND COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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May 15, 1986

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Petitioner Stroh Container Company regrets that it must lengthen the record herein by responding to certain charges and positions taken by Respondents Delphi Industries, Inc. and Geocaris and Company in their Brief in Opposition to the Petition for Certiorari. Because Respondents have twisted the facts and bent the law to make it appear that this case does not present a proper case for review by writ of certiorari, Petitioner feels compelled to set the record straight.

Respondents Have Misstated the Facts

Although Respondents insist that no review of the facts before the arbitrators is warranted, they engage in a misstatement of selected facts. In this regard, they go so far as to

indicate that the dissenter accepted Geocaris' proposed findings and imply that he agreed with the majority that Schlitz' conduct constituted "stonewalling." (Respondents' Br. 4-5). The dissenter did state that Petitioner had given repeated assurances that the quality problems would be corrected, but he went on to add "but I do not find that Geocaris had any rights under the circumstances." The dissenter added:

> As to the claims of liability under the UCC and the common law for 'bad faith', my review of the authorities establishes that something more than mere negligence is required, and as I have already said I do not feel that even negligence has been proven. Except for the mere lapse of time that Schlitz took to fix the product problems and return to production of consistently good beer, there is no evidence that Schlitz was not aware of the problem and working diligently on it, as of course Schlitz' own witnesses testified was the case. Much has been made of Schlitz' failure to acknowledge the problem publicly and to inform the distributors of its findings and intentions; in the competitive market which existed, and in view of the fact that the distributors were under no obligation to keep Schlitz' internal decisions confidential and that many distributors also had established relationships with other manufacturers, I should think that full disclosure of the problem to the distributors would have been out of the question. This failure to inform, coupled with the delay in correcting the product, is really all of the evidence we have as to non-warranty causes of action, and it does not come close to sustaining liability. (A-43).

More significantly, the dissenter also noted:

> We have been led only to the outskirts of the facts which are needed to sustain a cause of action. The most which has been shown is that product for a time was inferior as a result of various formula changes. *There is of course no suggestion that Schlitz intentionally sabotaged the product;* but there is also no hard proof that it was even negligent, leaving alone for the moment whether that would make a case. (A-41; emphasis added).

The dissenter also specifically rejected Respondent Geocaris' proposed findings 17, 35, 40, 41-45, which, among other things, had urged: that Schlitz brand beer was not "fixed" until July 1978; that but for the product problems, Schlitz would have maintained or increased its market share; and that the primary cause of the decline of sales was product problems.

Next, Respondents object to Petitioner's Statement of the Case, because they claim that it is not limited to the record below. (Respondents' Br. 2 n. 2). Respondents, however, do not point to any example of departures from the record. Factual allegations as to the contents of the Appendix are fully supported. As to other factual matters alleged, all are part of the record below. For example, the fact of the assignment of the right to the award to Harris Trust and Savings Bank and the Bank's agreement to be bound by the proceedings is contained in the District Court's judgment, which is included as Tab 37 of the Appendix, App. 342-343.[1] The fact that Geocaris sought only damages for declining sales due to customer dissatisfaction with the Schlitz brand beer product is clear from Respondents' only damages exhibit, CX 33-A—33C, which is Tab 31 to the Appendix, App. 271-273. The fact that Respondent Geocaris invited the arbitrators to disregard the law by, among other things, urging that speculative damages unsupportable in a court of law could be awarded or that the sole scope of review was whether the parties had a fair hearing, is clear both from portions of Respondent Geocaris' Brief to the Arbitrators, included in Tab 8 of the Appendix, App. 57-58, and from the Dissenter's opinion where he referred to the fact that "[Respondent Geocaris] and my colleagues have presented a number of authorities to the effect that arbitration awards will be upheld even if inconsistent with the law" (A-46). The fact that Respondent Geocaris, through counsel, had admitted that all of

[1] References to the Appendix below are cited App. _____. References to the Appendix herein are cited A-_____.

the alleged defective beer was sold appeared at pages 160 and 161 of the Arbitration Transcript which was referred to in Petitioner's proposed finding 48 (App. 76-77) and adopted by the Dissenter (A-37). Petitioner's Statement of the Case was a succinct, straightforward statement of relevant facts fully supported by the record below.

To the extent that the Court feels that any facts are important to its consideration, Petitioner requests that the opinions of the majority and dissenting arbitrators be reviewed. It has been and still is the Petitioner's position that under no construction of the facts is Respondent Geocaris entitled to any damages, because, as a matter of law, the type of damages sought are not recoverable and because, as a matter of law, the applicable statute of limitations in any event barred Respondent Geocaris' claims.

This Case Is the Perfect Vehicle for the Court to Reaffirm and Clarify Its Prior Decisions

Respondents have not addressed the first point raised by Petitioner in support of its Petition, namely, that the case demonstrates the need for the Court to reaffirm and clarify its prior decisions, a basis for review under the first clause of Rule 17(c) of the Supreme Court Rules. This case presents important questions of federal law which should be settled by this Court.

Respondents assert that the Court has not subsequently elaborated upon the "manifest disregard" standard of its decision in *Wilko v. Swan*, 346 U.S. 427 (1953), and that some recent appellate court decisions have questioned continuing validity of the standard (Respondents' Br. 9 n. 5), thereby implicitly acknowledging the need for a final resolution of the issue, but apparently in another case than this. Petitioner pointed out in its Petition that with the growing use of

arbitration in the commercial area, such issues must be resolved so that potential participants will not be dissuaded from using arbitration. This Court recognized this sort of concern and rationale in its review of the question whether it was for the courts or for a labor arbitrator to decide the arbitrability of a dispute in *AT&T Technologies, Inc. v. Communications Workers of America,* ____ U.S. ____, 54 U.S.L.W. 4339 (April 7, 1986), when it noted:

> The willingness of parties to enter into agreements that provide for arbitration of specific disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction ....' (540 U.S.L.W. at 4341).

This is also precisely the point made by the Seventh Circuit in *Jones Dairy Farm v. Local No. P-1236,* 760 F.2d 173, 176 (7th Cir.), *cert. denied,* 106 S.Ct. 136 (1985), where it voiced concern that if parties cannot get judicial review of questions of law, they will be deterred from agreeing to arbitration.

All parties, including the Court of Appeals below, seem to be of the view that important issues are still open for decision or clarification by this Court. The only question appears to be whether this is the case to decide the issues. Petitioner respectfully submits that it is.

The Courts of Appeals Are Divided on the Proper Application of This Court's Decisions to Commercial Arbitration Cases

Focusing upon the question whether this case presents any issues upon which the Courts of Appeals are divided, Respondents conclude that there are no conflicts presented either involving the "manifest disregard" or "essence of the contract" tests. They reach this result through convoluted reasoning.

Respondents first argue that Petitioner has contrived two imaginary conflicts regarding the "manifest disregard" test,

namely, whether the courts may apply the standard at all, and, if so, how the standard should be applied (Respondents' Br. 9).

Incredibly, Respondents make the first point that there is no conflict whether the "manifest disregarded" test may be applied, on the same page where in footnote 5 they claim that "some recent appellate decisions have questioned [*Wilko's*] continued vitality." In view of the additional facts that the Court of Appeals below declined to pass on the issue and that many appellate courts have acknowledged the vitality of the test, there is obviously a conflict whether the "manifest disregard" test is available.

As to the second point, the proper application of the test, it is even more ludicrous for Respondents to assert that Petitioner "can claim no more than that the panel majority applied the law differently than [Petitioner] wanted," and that no other court has favorably applied the test. (Respondents' Br. 16). Whether or not other courts have applied the test to vacate an award is irrelevant.[2] *No other case has presented so gross a misapplication of the law at the suggestion of one of the parties.* Cases were cited by Geocaris to the arbitrators to support points where Respondent Geocaris' case was weakest, and, in particular, those supporting the award of damages too speculative to be awarded in a court of law. The majority arbitrators then discussed with the dissenter those authorities in an obvious attempt to have him join in their award known to them to be contrary to the law. A more manifest disregard of the law would be difficult to imagine.

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[2] *General Telephone Co. v. Locals 1635, 1636 and 1637,* 427 F.Supp. 398 (W.D. Pa. 1977), is one case which vacated an award for a "manifest disregard of the law." The fact that courts have not found a "manifest disregard of the law" in certain circumstances does not vitiate the standard or reduce its relevance to the scope of judicial scrutiny of arbitration awards.

Finally, Respondents dispute the clear conflict between the Eighth Circuit decision in this case and the Third Circuit decision in *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972), on the scope of review of commercial arbitration awards, by addressing a different point in the text and relegating a discussion of a conflict to a footnote. (Respondents' Br. 12 n. 7). The Third Circuit in *Swift Industries* had held that although labor cases, like the *Steelworkers* trilogy, were applicable in commercial cases, the scope of review of labor arbitration awards was more limited than the review of commercial arbitration awards. The Court of Appeals below did not expressly address the point, but it relied wholly upon the more limited labor cases and standards in its review, in direct conflict with the Third Circuit's holding.

Respondents Misconceive
Petitioner's Jurisdictional Challenge

Respondents argue that there is no conflict on the jurisdiction issue and that, in any event, Petitioner has not been prejudiced. The last point can be put to rest simply: subject-matter jurisdiction does not depend upon questions of prejudice or even consent.

As to the former point, it should first be noted that the courts below erred in relying upon cases which involved pre-arbitration litigation and which are clearly distinguishable. For example, the District Court relied only upon *Paul Allison, Inc. v. Minikin Storage of Omaha*, 452 F.Supp. 573, 574-575 (D. Neb. 1978), and *NII Metal Services, Inc. v. ICM Steel Corp.*, 514 F.Supp. 164, 166 (N.D. Ill. 1981), cases in which the court had retained jurisdiction in pre-arbitration litigation pending the arbitration. The Honorable Milton I. Shadur, the Illinois district judge to whom Respondents' case was assigned originally, had authored the *NII Metals* opinion and had noted at the hearings in this case before its transfer that *NII Metals* did

not control here, because the district court in the pre-arbitration proceedings had not retained jurisdiction.[3] The Court of Appeals relied only upon cases and authorities involving Sections 3 and 4 of the Federal Arbitration Act (A-5 n. 7), and did not even address the cases cited by Petitioner (Petitioner's Br. 19), all of which have held that absent agreement in the contract as to a particular court, the action to confirm was to be brought in the federal court for the district in which the award was made. Respondents' attempt to distinguish the cases is simply wrong. All of those cases dealt directly with the issue and present a clear conflict with the decision below, which would permit an action to confirm to be brought in any court if there is diversity jurisdiction.

Petitioner submits that so long as the Court of Appeals' decision below stands uncorrected, there will be continuing doubt as to an important jurisdiction issue. Again, this case presents an opportunity for the Court to resolve that issue once and for all.

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[3] The Second Circuit case cited by Geocaris in footnote 8, *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), involved an analogous situation likewise not relevant here.

Conclusion

For the reasons set forth herein, and those set forth in the previously-filed Petition, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

May 15, 1986

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